No. 18-1855/18-1871

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY B.; JESSIE K., a minor, by Yvette K., guardian ad litem; CRISTOPHER R., a minor, by Escarle R., guardian ad litem; ISAIAS R., a minor, by Escarle R., guardian ad litem; ESMERALDA V., a minor, by Laura V., guardian ad litem; PAUL M.; JAIME R., a minor, by Karen R., guardian ad litem,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, Governor; TOM MCMILLIN, member of MI Bd of Education; MICHELLE FECTEAU, member of the MI Bd of Education; LUPE RAMOS-MONTIGNY, member of the MI Bd of Education; PAMELA PUGH, member of the MI Bd of Education; JUDITH PRITCHETT, member of the MI Bd of Education; CASANDRA E. ULBRICH, member of the MI Bd of Education; NIKKI SNYDER, member of the MI Bd of Education; TIFFANY TILLEY member of the MI Bd of Education; SHEILA ALLES, Interim Superintendent of Public Instruction for the State of MI; TRICIA L. FOSTER, Director of the MI Dept of Technology; WILLIAM PEARSON, State School Reform/Redesign Officer, in their official capacities,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan,
The Honorable Steven J. Murphy III, Presiding
Case No. 2:16-CV-13292

BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents significant and complex issues involving the United States Constitution and the State of Michigan's system of public education. In addition, whether there is a fundamental right of access to literacy under the Fourteenth Amendment of the United States Constitution is an issue of first impression in this circuit. Accordingly, Defendants believe oral argument would aid this Court in reaching a decision and respectfully request oral argument.

JURISDICTIONAL STATEMENT

Because Plaintiffs raised questions of federal law under the Constitution of the United States, the district court had jurisdiction under 28 U.S.C. § 1331. (Complaint, R. 1, PageID#126-128.)

The district court dismissed Plaintiffs' claims with prejudice on June 29, 2018 (Op. and Order, R. 112; Judgment, R. 113). Plaintiffs timely filed their Notice of Appeal on July 26, 2018. (Notice of Appeal, R. 114.) On July 27, 2018, the district court *sua sponte* issued a corrected Opinion and Order (Corrected Op. and Order, R. 117), following which Plaintiffs timely filed an amended Notice of Appeal on July 30, 2018. (Amd. Notice of Appeal, R. 118.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

As to all Defendants:

1. Where subsequent events render all claims for prospective relief moot and the Eleventh Amendment prevents retroactive relief, the case must be dismissed. Plaintiffs' claims against Defendants have been mooted because the laws supporting an inference of State control over Detroit schools have been repealed or are no longer applicable. And all Defendants, as State officials, are immune to claims for retroactive relief. Should this Court dismiss Plaintiffs' appeal on these alternative grounds?

As to Michigan State Board of Education Members Tom McMillin and Nikki Snyder only:

2. The Due Process Clause prevents government interference with certain fundamental rights and liberty interests. The list of fundamental rights is short, and Courts are reluctant to expand it. Does the Due Process Clause demand that a state affirmatively provide each school child with a defined, minimal level of education by which the child can attain literacy?

3. The Equal Protection Clause requires that all persons similarly situated should be treated alike. A plaintiff must adequately plead disparate treatment as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis. Where no fundamental right is at issue and Plaintiffs failed to allege facts about the relevant comparator schools, and failed to allege what, if any, state action was irrational, did the district court correctly dismiss Plaintiffs' Equal Protection claim?

INTRODUCTION

Since Plaintiffs filed their complaint in September 2016, most of the Defendants' State officials are different.[1] Governor Gretchen Whitmer took office on January 1, 2019, as did new State Board of Education members Judy Pritchett and Tiffany Tilley. State Board members Tom McMillin and Nikki Snyder took office on January 1, 2017. John Austin, Kathleen Straus, Eileen Weiser, and Richard Zeile are no longer on the State Board of Education. Sheila Alles, Interim Superintendent of Public Instruction, replaced Brian Whiston, and William Pearson replaced Natasha Baker as the State School Reform/Redesign Officer (SRO).[2] Even the role of the Director of the Department of Technology Management and Budget has changed.[3]

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[1] Pursuant to Fed. R. Civ. P. 25(d), the new state officials are automatically substituted as parties.

[2] 2018 Mich. Pub. Acts 601 repealed M.C.L. § 380.1280c, effective June 30, 2019. The State School Reform/Redesign District and the SRO will be abolished.

[3] The State School Reform/Redesign Office and the position of the SRO were transferred from the Michigan Department of Technology Management and Budget to the Michigan Department of Education under Executive Order No. 2017-5 on June 30, 2017.

In Argument I, all of the Defendants ask this Court to dismiss Plaintiffs' appeal on mootness grounds. The facts and applicable laws governing Plaintiffs' complaint have fundamentally changed, and so any opinion that this Court might issue on the constitutional claims would be an advisory opinion.

Michigan's Legislature has passed significant new laws designed to improve the educational opportunities for students in the Detroit Public School Community District (DPSCD). In 2016, the emergency manager was removed, and Detroit citizens elected a board of education to assume full local control of the new, debt-free District. In addition, the Legislature provided an additional $70 million per year to the District until at least 2027.

Michigan Public Acts 192 through 197 of 2016 changed the landscape in which Plaintiffs' complaint relied. The Detroit Public School District (DPS) was divided into two entities: The Qualifying School District (old DPS) to pay off the debt, and the Community District, which would operate the schools. In November 2016, Detroit residents elected a new board of education which assumed control of the

operation of the schools on January 1, 2017. The new school board hired a superintendent in April 2017.

The new Community District has now been under direct local control for the past two school years. There is no longer an emergency manager for the District. The Education Achievement Authority (EAA) was dissolved under the 2016 legislation. The Community District operates without any of the debt incurred under the old district—approximately $720 million. And under 2018 Mich. Pub. Acts 601, effective June 30, 2019, the statute creating the State School Reform/Redesign District and the SRO is repealed. This will eliminate Priority Schools.

Even if Defendants were the proper parties when this case was filed, they are no longer the proper parties because of these changed circumstances, which has restored local control. As a result, the Plaintiffs' claims are now moot. Although Plaintiffs may argue they have claims that relate to the period before the sweeping state actions described above, retroactive remedies against Defendants are barred under the Eleventh Amendment. Accordingly, Plaintiffs have no remaining viable claims against Defendants. And any attempts by

Plaintiffs to amend their complaint against these Defendants would be futile.

In Arguments 2 and 3, which this Court should not reach because they are no longer justiciable, only Defendants State Board of Education members Tom McMillin and Nikki Snyder alternatively argue that the district court correctly held that there is no fundamental constitutional right to access literacy and that the district court properly denied Plaintiffs' equal protection claim against the State officials. The other Defendants do not address these claims and the court need not reach them.

On the constitutional issues, Defendants McMillin and Snyder note that Plaintiffs invite this Court to recognize—for the first time in our nation's history—a fundamental right compelling states to provide a government service: access to literacy. This request stands in stark contrast to fundamental rights that American courts have recognized in the past, which afford protection against unwarranted government interference. Plaintiffs insist, without any support in case law or the text of the Constitution, that access to literacy is a fundamental right

that the State must provide to every individual. The district court properly rejected Plaintiffs' invitation. This Court should affirm.

Without identifying any specific action by any specific Defendant, and without challenging the validity of any law under which Defendants operate, Plaintiffs claim that Defendants excluded students at Detroit Public Schools (DPS) from access to literacy.

Plaintiffs' claims go beyond access to the statewide education system on an equal basis and, instead, demonstrate that Plaintiffs seek to create a positive fundamental right requiring affirmative state action to implement specific literacy programs. These decisions are made at the local level by elected boards of education under Michigan's deeply rooted tradition of local control over the operation of community schools.

Plaintiffs never alleged that Michigan's school governance system is irrational, nor that any of the laws under which the Defendants acted were irrational. Nor did Plaintiffs allege any specific facts to demonstrate that the Defendants' actions in implementing various laws were irrational. The district court correctly held that Plaintiffs failed to state a claim for relief based on the Equal Protection Clause, where they simply pointed out certain conditions existing at the five Detroit

schools as prima facie evidence that the State Defendants acted irrationally. Accordingly, the decision below must be affirmed.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS

In 2016, the State of Michigan created a new school district to serve Detroit children: the Detroit Public School Community District (DPSCD). 2016 Mich. Pub. Acts 192, §12b; §§ 381-396. The DPSD was divided into two entities: The Qualifying School District (old DPS) and the DPSCD, which would operate the schools.[4] The new district allowed Detroit schools to operate without the burden of the old district's debt, leaving the structure of the old district in place solely to pay off that debt. 2016 Mich. Pub. Acts 192, § 12b; §§ 381-396. The old district continues to collect local property taxes to pay off its debt and the State provides funding to the DPSCD equal to the property taxes collected.[5] This holds the DPSCD–and the children and families it serves– harmless for the accrued debt of the old district.

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[4] House Fiscal Agency Analysis of HB 5384, http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-5384-4D9538F1.pdf, last accessed May 16, 2019.

[5] House Fiscal Agency Analysis of HB 5383, http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-5383-665D4301.pdf. Last accessed May 16, 2019.

2016 Mich. Pub. Acts 193 provided a total of $617 million to help restructure the district, including $467 million to help pay off long-standing debt that cost the district $1,100 per pupil annually. The State provided an additional $70 million per year to the District until at least 2027, allowing the old district to continue to pay its debt–which will be retired in full by 2027–without penalty to the DPSCD. 2016 Mich. Pub. Acts 192 provided an additional $250,000 for training and administration for the DPSCD school board. Additionally, 2016 Mich. Pub. Acts 197 made available another $150 million to improve facilities and invest in student achievement, and removed the prohibition of emergency loans to first class school districts, further helping to fund the payment of debt and the cost of transitioning to the new district.

Several other developments have also occurred beyond financial assistance. In 2016, the emergency manager was removed, and, in November 2016, Detroit residents elected a new board of education, which assumed control of the operation of the schools on January 1, 2017. The new school board hired a superintendent in April 2017. The EAA was dissolved and its schools became part of the DPSCD. On June

30, 2019, the SRO and Priority Schools will be eliminated because M.C.L. § 380.1280c was repealed. 2018 Mich. Pub. Acts 601.

With the new school board and superintendent in place, and with a new, state-funded financial footing, the Legislature ended a period of extraordinary and unfortunate, but necessary, financial and administrative intervention by the State into the local operations of Detroit's schools.[6]

A. The DPS Legacy of Financial and Academic Decline

The DPSD's history of financial and academic decline predates 1999. (Complaint, R. 1, ¶68, PageID#50.) DPS ran deficits in eleven of the fifteen fiscal years between 1972 and 1988, by which time it had a $103,000,000 deficit. The last surplus balance DPS reported was $1.5 million for the 1977-78 school year. (Select Panel 1988 Rpt., R. 60-5, PageID#573.) DPS's enrollment followed a similar trajectory, declining by 13.2 % between 1981 and 1988 alone. (*Id.* at 596.) Enrollment

[6] During this period, two legal settlements further clarified responsibilities for buildings within the DPSCD. First, the City of Detroit accepted responsibility for building inspection and safety. (Consent Agreement, R. 96-4, PageID#1904-23.) Second, the DPSCD itself accepted responsibility for building maintenance. (Settlement Agreement, R. 96-3, PageID#1896-98.)

declines from 2003 to 2008 resulted in a reduction in state aid on a per-pupil basis of $70.3 million. (Council of Great City Schools 2008 Rpt., R. 60-6, PageID#837.)

In addition to the Districts' financial concerns, the Michigan Legislature addressed the poor academic performance of DPS students by creating a school reform board to operate the District. 1999 Mich. Pub. Acts 10. The Senate Fiscal Analysis described the rationale for this legislation:

> The State's largest school district, the Detroit Public Schools, ranks among the worst school districts in the state in such areas as dropout rates and test scores, according to the Department of Education's 1998 Michigan School Report.
>
> * * *
>
> Furthermore, many people believe that problems with the governance and management of the district have only impeded any school improvement efforts.

http://www.legislature.mi.gov/documents/1999-2000/billanalysis/Senate/pdf/1999-SFA-0297-E.pdf.

The population of the City of Detroit also shrank dramatically,[7] resulting in an ever-decreasing tax base. The problems were

[7] In 1990, City residents numbered 1,027,974. In 2000, they numbered 951,270, a 7.4% decrease from 1990. http://www.city-data.com/us-cities/The-Midwest/Detroit-Population-Profile.html. (Accessed

compounded by the collapse of the real estate market and taxable real estate values, and by the bankruptcies of the auto companies, with the concomitant loss in tax revenues – all in the context of the greatest recession since the great depression.

All of these factors caused the State to intervene in the DPS.

B. The State of Michigan's Intervention in School Districts

In *Phillips v. Snyder*, 836 F.3d 707, 710-713 (6th Cir. 2016), this Court described the evolution of Michigan laws providing for appointment of an individual to manage aspects of a local government.[8]

Since 1988, Michigan has enacted laws that allow the State to intervene when local governments experience fiscal distress. The Local Government Fiscal Responsibility Act, 1988 Mich. Pub. Acts 101, was consistent with the U.S. Advisory Commission on Intergovernmental Relations recommendations for greater state monitoring of, and

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February 23, 2019.) In 2010, the City had a population of 713,777 – a 24.9 % decrease from 2000. http://www.census.gov/quickfacts/table/PST045215/2622000. (Accessed February 23, 2019.)

[8] As discussed later, the district court outlined Michigan's Public Acts that gave the State more involvement overseeing a school district's finances. (Corrected Op. and Order, R. 117, PageID#2787-96.)

involvement in, local fiscal affairs during financial crises. (*City Financial Emergencies: The Intergovernmental Dimension*, Advisory Commission of Intergovernmental Relations, July 1973, R. 60-7, PageID#1046.)

In order to address poor academic conditions, the State enacted legislation to reorganize the DPS in 1999, eliminating the regional boards for a 7-member central Board, with six members appointed by the Mayor, and a chief executive officer. 1999 Mich. Pub. Acts 10, M.C.L. §§ 380.371-380.376 (now repealed). See generally *Moore v. Detroit School Reform Bd.*, 293 F.3d 352 (6th Cir. 2002). The law also provided that after five years the residents of DPSD could choose between two options for the Board's configuration and selection process. M.C.L. § 380.410(2). In November 2004, DPSD electors voted to restore local control with an 11-member board, seven elected by district and four at large members.

After four years of local control, the State was again required to intervene because of DPS's severe financial conditions. Governor Granholm appointed the District's first emergency financial manager in 2009 under the authority of 1990 Mich. Pub. Acts 72. The District was

under the control of an emergency manager until 2016. In 2011, the emergency manager was given greater authority under 2011 Mich. Pub. Acts 4 and then its successor law, 2012 Mich. Pub. Acts 436, M.C.L. § 141.1541, *et. seq*. Under these laws, the emergency manager acted "solely for and on behalf of the school district," and could exercise "all other authority and responsibilities affecting the school district that are prescribed by law to the school board and superintendent of the school district." M.C.L. § 141.1554(f).

As part of a package of bills designed to qualify for federal Race to the Top grants, the legislature enacted 2009 Mich. Pub. Acts 204. This law required the State Superintendent of Instruction to publish an annual list of the lowest achieving 5% of all public schools in the State. The Superintendent was required to issue an order placing each public school on the list under the supervision of the State SRO. Those schools were required to submit a redesign plan to the SRO for approval. M.C.L. § 380.1280c. These schools came to be known as "Priority

Schools."[9] Many Priority Schools were located in the DPSD, and 15 Priority Schools came under the authority of the EAA.

C. The State of Michigan's Role in Public Education

In *L.M. v. State*, 862 N.W.2d 246 (Mich. Ct. App. 2014), the Michigan Court of Appeals explained that the role of the state in education "is neither as direct nor as encompassing" as contended. *Id.* at 252-53. Michigan's constitution only requires the legislature to "maintain and support a system of free public elementary and secondary schools, as defined by the law," with a local school district having the responsibility to "provide for the education of its pupils [.]" *Id.* (quoting Mich. Const. Art 8, § 2.)

Absent the State intervening to address severe financial or academic problems in a school district, Michigan has long recognized that local school boards are responsible for educating their pupils. M.C.L. §§ 380.11a(3)(a), 380.601a(1)(a), and 380.1282(1).

Michigan courts have consistently noted that no single tradition in public education is more deeply rooted than local control over the

[9] See https://www.michigan.gov/documents/mde/Priority_FAQ_427729_7.pdf. Last accessed May 16, 2019.

operation of schools. Local autonomy has long been thought essential both to the maintenance of community concern and support for public schools, and to the quality of the educational process. *Widdoes v. Detroit Pub. Sch.*, 553 N.W.2d 688, 690-691 (1996)(collecting authorities).

D. District Court Proceedings

On September 13, 2016, Plaintiffs filed their complaint, alleging that decades of State disinvestment and deliberate indifference to Detroit schools denied them the opportunity to access literacy, which they claim to be a fundamental right, and denied them equal protection under the law.[10] (Complaint, R. 1 ¶90, PageID#62-63.) Defendants moved to dismiss on November 17, 2016. (Mot to Dismiss, R. 60, PageID#479.) Following oral argument on August 10, 2017, the district court dismissed Plaintiffs' claims with prejudice on June 29, 2018, finding that there was no fundamental right of access to literacy and no Equal Protection violation. (Corrected Op. and Order, R. 117, PageID#2819-24.)

[10] Plaintiffs voluntarily dismissed Counts Two and Four, claiming a state-created danger under § 1983 and a violation of Title VI of Civil Rights Act, respectively. (Corrected Op. and Order, R. 117, PageID#2787.)

Defendants had argued that they did not have authority or control over Detroit schools and, therefore, were not proper parties to be sued. (*Id.* 2787.) The district court provided a detailed discussion of this argument in the context of successive state statutes and actions.

The district court began by discussing the Revised School Code, M.C.L. §§ 380.1 *et seq*., which sets forth the structure of Michigan's system of public education, generally at a local level via school boards. (Corrected Op. and Order, R. 117, PageID#2788-89.) Moving from the Revised School Code, the district court discussed several public acts "permitting state officials to appoint managers in the event of financial crises." (*Id.* at 2789.)

The court noted that in 2008, the Governor appointed an emergency manager for Detroit schools under Public Act 72. (*Id.* at 2790.) Although the emergency manager shared power with the DPS School Board, he could exercise authority over both financial and educational factors. (*Id.*) The powers of the emergency manager were expanded in 2011 with the passage of Public Act 4, which was later replaced by the "very similar" Public Act 436. (*Id.*) Under these public

acts, the emergency managers exercised all powers that had previously been retained by the school board and superintendent. (*Id.*)

In addition to these successive acts, the district court found that the State had involved itself in the DPS for low student proficiency reasons. The State required the Superintendent of Public Instruction to publish a list of Michigan's lowest-performing schools, which were then placed under the supervision of the SRO. (*Id.* at 2790-91.)

The Court also discussed the EAA, a joint creation of the DPS emergency manager and Eastern Michigan University, that transferred 15 Detroit schools into a new district. (*Id.* at 2791-92.) The district court concluded that "there is no question that the State has been heavily involved with Detroit schools for some time." (*Id.* at 2792.) The district court found that "Defendants are not emergency managers," but nonetheless they "were responsible for the selection and appointment of the emergency managers." (*Id.* at 2795) This led the district court to conclude that Plaintiffs "have adequately pled that [Defendants] effectively control the schools, at least in part, and are therefore proper parties." (*Id.* at 2796.)

Moving to the merits of the case, which only defendants McMillin and Snyder address, the district court carefully discussed the relevant case law, finding that the Supreme Court has not held education to be a fundamental right. (*Id.* at 2806-13.) The district court, however, agreed with Plaintiffs' claim that access to literacy is distinct from education and remains unaddressed by the case law.[11] (*Id.* at 2796-97, 2813.)

Addressing whether access to literacy is a fundamental right under the Due Process clause of the Fourteenth Amendment, the district court found that Plaintiffs only raised substantive due process claims. (*Id.* at 2813.) According to the district court, fundamental rights are limited to those that are "'objectively, deeply rooted in this Nation's history . . . such that neither liberty nor justice would exist if they were sacrificed.'" (*Id.* at 2804.) And courts are reluctant to expand the concept of substantive due process to cover new rights. *Id.*

The district court held that fundamental rights are generally limited to negative rights—"the right to be free from restraint or

[11] The district court, however, admitted that "access to literacy" is essentially "a minimally adequate education." (Corrected Op. and Order, R. 117, Page ID#2815.)

barrier." (*Id.* at 2815.) Fundamental rights do not provide an affirmative right to governmental aid. (*Id.*)

The district court recognized that Plaintiffs seek a positive right, which is confirmed by the relief requested: "Defendants must implement 'evidence-based programs for literacy instruction and intervention,'" and other similar, positive actions by the State. (*Id.* at 2815-16.) Essentially, Plaintiffs contend they "are entitled to a minimal level of instruction on learning to read" that the State failed to provide. (*Id.* at 2816.)

The court acknowledged the importance of literacy, but that does not transform it into a fundamental right. Courts have consistently rejected the proposition that the necessity of something—safety or shelter—creates a positive right that requires the government to provide it. (*Id.* at 2817.) And the history of education in America "runs counter to the notion that ordered society demands that a state provide one." (*Id.* at 2818.) Indeed, where courts have found a right to a minimum level of education, they have relied on express language in state constitutions, not substantive due process. (*Id.* at 2819.)

The question in this case was whether Due Process requires that the state "affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy." (*Id*. at 2819-20.) According to the district court, the "the answer to the question is no." (Corrected Op. and Order, R. 117, PageID#2819-20.)

Moving to Equal Protection, the district court found that "Michigan schools as a whole are not the appropriate comparator" because Plaintiffs haven't challenged a statewide funding scheme or any specific statutes or decisions of Defendants. (*Id*. at 2820-21) The appropriate comparison is to "other Michigan schools that have come under the control of emergency managers, been designated a Priority School or were governed by the EAA." *Id*. at 2821.

The district court found that Plaintiffs failed to allege a viable Equal Protection claim. First, because "access to literacy" is not a fundamental right, it cannot anchor an Equal Protection claim. *Id*. at 2821. Second, although Plaintiffs alleged that their schools predominantly serve children of color, they made no claims about comparative schools. In fact, they made only one allegation regarding the racial composition of another district–Gross Pointe–which is

controlled by a local school board and has not been subject to state intervention. Therefore, it is not a proper comparative district. According to the district court, the complaint failed to allege "any instance where Defendants intervened in a school with a different racial makeup and treated that school disparately." (*Id.* at 2822.) Thus, Plaintiffs failed to sufficiently allege the targeting of a suspect class.

Because no fundamental right or suspect class is involved, the district court applied rational basis scrutiny. (*Id.* at 2822.) The complaint, however, never expressly states what state action is irrational: it does not challenge the state-wide funding system, a specific statute or public act. (*Id.* at 2823.) The district court inferred that the challenge could only be to Defendants' "actions in implementing the various state laws." (*Id.*) The complaint, however, "fails to provide a concrete example" of this. Merely pointing to certain conditions and claiming they are the result of Defendants' irrational action fails to articulate a basis for a claim.

The district court held that Plaintiffs failed to "plausibly [plead] the irrationality of [Defendants'] decisions." (*Id.* at 2824.) Accordingly,

Plaintiffs failed "to state a claim for relief based on the Equal Protection Clause and must be dismissed" with prejudice. (*Id.*)

STANDARD OF REVIEW

Although this Court reviews de novo a district court's decision on a motion to dismiss, *Gunasekera v. Irwin*, 551 F.3d 461, 465-466 (6th Cir. 2009), statutes are presumed constitutional. *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 552 (6th Cir. 2004). See also *Keith v. Clark*, 97 U.S. 454, 468 (1878); *Tower Realty v. City of E. Detroit*, 196 F.2d 710, 718 (6th Cir. 1952). Moreover, courts must presume that state legislatures "have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973)(Stewart, J., conc.).

SUMMARY OF ARGUMENT

As a result of legislative changes that eliminated emergency manager control of DPS, dissolved the EAA, repealed the statute creating the SRO and prescribing the SRO's authority over the lowest achieving public schools in this state, and created a new debt-free DPSCD with a locally elected school board to operate its schools,

Defendants are no longer the proper parties to provide the relief Plaintiffs seek in their complaint. Because Plaintiffs can only obtain prospective injunctive relief against the Defendants, they no longer have viable claims and this appeal should be dismissed as moot. Any attempt by Plaintiffs to amend their complaint against these State officials would be futile.

This Court need not address the merits of Plaintiffs' constitutional claims, and Defendants—other than State Board of Education members Tom McMillin and Nikki Snyder—do not address these claims.

Defendants McMillin and Snyder argue that the district court correctly found that the U.S. Constitution does not recognize a fundamental right of access to literacy, nor should the courts recognize such a right. Educational policy decisions should be made through public debate and legislative changes both at the state and local community level—not by the Courts.

In addition, McMillan and Snyder argue that the district court correctly dismissed Plaintiffs' equal protection claim. The district court properly applied the rational basis standard and concluded that Plaintiffs failed to challenge any law under which Defendants acted,

failed to specify any concrete actions that Defendants took that were irrational, and simply alleged that certain conditions in the schools were caused by the Defendants. Moreover, Plaintiffs failed to allege that a similar comparative school district—one in which the State had intervened—was treated differently than Plaintiffs. The district court correctly dismissed Plaintiffs' complaint with prejudice.

ARGUMENT FOR ALL DEFENDANTS:

I. Plaintiffs' claims have been mooted because of subsequent events, retroactive relief is barred under the Eleventh Amendment and therefore this Court should dismiss Plaintiffs' appeal.

In the past few years, the groundwork upon which Plaintiffs framed their complaint has shifted. The facts and law on which the district court premised its holding that Defendants had "been heavily involved with Detroit schools" have changed. (Corrected Op. and Order, R. 117, PageID#2792.) The changes in Michigan—both factually and legally—with respect to the allegations in Plaintiffs' complaint here have been significant. No live controversy remains because the prospective relief Plaintiffs seek must now come from the DPSCD Board of Education, which is not a party to this litigation.

That is the end of the matter because this Court does not issue advisory opinions. *Fialka-Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 714-15 (6th Cir. 2011). The Eleventh Amendment bars retroactive relief against state officials. Any effort to amend the complaint would be fruitless as a result. This Court should dismiss the appeal.

A. Due to subsequent legislation and other developments since Plaintiffs filed this lawsuit, Defendants no longer have the necessary control to render them the proper defendants in this case.

As a legal matter, the locally elected DPSCD Board of Education and its superintendent now have direct control over the operation of the schools in the district; there is no longer an emergency manager. The EAA was abolished in 2016 and, effective June 30, 2019, the SRO and priority schools will be abolished. Taken together, the circumstances surrounding the control over Detroit's schools and Defendants' ability to provide the relief Plaintiffs request have been so altered as to render Plaintiffs' claims moot.[12]

[12] To the extent these facts are not contained in the record on appeal, this Court can give judicial notice to these indisputable facts under *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012).

1. Intervening events, including the cessation of allegedly illegal conduct and changes to the law, can moot a claim.

Article III of the Constitution limits the federal courts to adjudicating actual "cases or controversies." U.S. Const. art. III, § 2. A plaintiff's personal interest in the litigation must exist both at the commencement of the suit and throughout the suit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189 (2000). Thus, "cases that do not involve actual, on-going controversies are moot and must be dismissed for lack of jurisdiction." *Campbell v. PMI Food Equip. Grp., Inc.,* 509 F.3d 776, 782 (6th Cir. 2007).

Events that occur in the course of the lawsuit can render a claim moot. *Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990). Changes in the laws upon which a plaintiff bases her claim will moot a case, even on appeal. *Banas v. Dempsey*, 747 F.2d 277, 281 (6th Cir. 1984). Although the party claiming mootness bears a heavy burden, if it has ceased the allegedly illegal conduct, without any reasonable expectation that it will be repeated, the case is moot. *Mosley*, 920 F.2d at 415.

The cessation of allegedly illegal conduct by governmental parties, however, is treated more leniently:

> "[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties . . . such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." [*Mosley*, 920 F.2d at 415 (quoting 13A, Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.7 at 353 (2d ed. 1984).]

Defendants, of course, are all governmental officials. Accordingly, their cessation of the conduct on which Plaintiffs' claims are premised must be granted "more solicitude," thus mooting this case.

2. Subsequent changes in the law and actions by the State have rendered Plaintiffs' claims moot.

It can no longer be claimed that Defendants are "heavily involved with Detroit schools." (Corrected Op. and Order, R. 117, at 2792.) The statutes on which the district court relied have either been repealed or are not being used by Defendants to intervene in Detroit Schools.

For instance, in determining that the Defendants were the proper parties, the district court reasoned that these State actors had some involvement with the selection of the emergency manager, the operation of the EAA, and the designation and supervision of priority schools. (Corrected Op. and Order, R. 117, PageID#2789-2796.)

But 2016 Mich. Pub. Acts 192 removed the emergency manager once the newly elected DPSCD School Board took office on January 1,

2017. That statute also dissolved the EAA. The EAA no longer exists; Detroit schools under the EAA were absorbed by the DPSCD in 2017.[13]

The State also repealed the statute creating the State School Reform/Redesign District and the SRO. Effective June 30, 2019, the SRO and Priority Schools will be eliminated. 2018 Mich. Pub. Acts 601. In November 2016, Detroit residents elected a new board of education, which assumed control of the operation of the schools on January 1, 2017. The new school board hired a superintendent in April 2017. In short, any role that any of the State officials had in the State's intervention in the old DPS has effectively ceased.

Plaintiffs ask for "[i]njunctive relief requiring Defendants and their officers, agents, and employees to ensure that Plaintiffs' and class members have the opportunity to attain literacy" via specialized literacy programs, universal screening, and a system of monitoring compliance. (Complaint, R. 1, PageID#131-32.) But the DPSCD Board—not the State officials—has control over the maintenance and improvements of its schools and determines what courses of study

[13] See https://www.michiganradio.org/post/after-six-years-education-achievement-authority-leaves-behind-lackluster-legacy. Last accessed May 23, 2019.

should be pursued. M.C.L. § 380.1282(1) and § 380.1278. And any retroactive relief against the Defendants would violate the Eleventh Amendment. Similarly, due to the fundamental alteration of the underlying facts, a declaratory judgment is not appropriate because there are no plausible, ongoing legal violations by the Defendants. At present, Plaintiffs essentially ask for an advisory opinion on the state of affairs that existed while the District's schools were under state intervention, but which no longer exist. The U.S. Constitution does not permit this. *Fialka-Feldman*, 639 F.3d at 714-15.

B. To the extent Plaintiffs have any remaining viable claims, they are barred under the Eleventh Amendment.

The Eleventh Amendment bars suits by any individual against a state in federal court, unless the state has expressly waived its immunity. *Hans v. Louisiana*, 134 U.S. 1, 10, 15 (1890); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 673 (1974). Michigan has not waived its immunity. Nor can a court issue relief, monetary or retroactive, that would be paid from a state's treasury. *Id.* at 664-69. The Eleventh Amendment does not simply bar payments from the state treasury, but also "serves to avoid the indignity of subjecting a state to the coercive

process of judicial tribunals at the instance of private parties." *Pucci v. Nineteenth Dist. Court*, 628 F. 3d 752, 761 (6th Cir. 2010).

Although *Ex Parte Young*, 209 U.S. 123, 155-56 (1908) allows *prospective* injunctive and declaratory relief, it is limited to compelling a state official to comply with federal law. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). The *Young* exception does not extend to *retroactive* relief. *S&M Brands Inc. v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008), citing *Quern v. Jordan*, 440 U.S. 332, 338 (1979). Moreover, the Eleventh Amendment precludes individuals from bringing suit against state officials when the suit "seeks the award of an accrued monetary liability which must be met from the general revenues of a State." *Edelman*, 415 U.S. at 664. Simply put, the Eleventh Amendment prevents payment of state funds to remedy prior state conduct. *Florida Ass'n of Rehabilitation Facilities v. Florida Dep't of Health and Rehabilitative Servs.*, 225 F.3d 1208, 1220 (11th Cir. 2000). This prohibits any payment by the state as redress for "*past* breach of legal duties by state officials." *Id.* at 1221 (emphasis in original).

The date of the judgment, not the date of the alleged harm or even the date on which the case is filed determines whether the relief is retroactive. *Buckhanon v. Percy*, 708 F.2d 1209, 1215 (7th Cir. 1983),[14] citing *Edelman*, 415 U.S. at 668 and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451 (1976). See also *Florida Ass'n of Rehabilitation Facilities*, 225 F.3d at 1222. Because the Eleventh Amendment only allows federal courts to provide prospective relief for the ongoing conduct of state officials, they are barred from ordering any relief for conduct that occurred before the judgment.

If this Court were to reverse the district court, the only relief this Court may provide to Plaintiffs is a remand for entry of judgment in their favor. As demonstrated above, however, the "control" over Detroit schools that form the basis of Plaintiffs' claims no longer exists. The DPSCD and its superintendent have exclusive control over all of the activities Plaintiffs claim resulted in a violation of their fundamental right of access to literacy. And the State has invested hundreds of

[14] In *Buckhanon*, the Court determined that the portion of the lower court's order that required payment prior to entry of the order was retroactive and barred by the Eleventh Amendment. *Buckhanon*, 708 F.2d at 1216.

millions of dollars in Detroit's schools intended to give students improved access to literacy. Accordingly, there is no continuing conduct of a state official to enjoin under *Young*.

At most, this leaves Plaintiffs with claims for the *past* conduct of Defendants. Federal courts, however, can only enjoin the ongoing, prospective actions of state officials. The only possible relief Plaintiffs could obtain on remand for Defendants' past conduct would necessarily be retroactive and therefore barred by the Eleventh Amendment. Since Plaintiffs cannot state any claim for prospective relief against Defendants, all of whom are state officials, this appeal is moot and should be dismissed.

C. Plaintiffs' belated request to amend should be rejected as unpreserved and futile.

Plaintiffs fault the district court for not allowing them to amend their complaint. (Appellants' Brief, Doc. 49, p. 68.) But Plaintiffs never asked to amend, rendering this claim unpreserved. Accordingly, this Court should not consider it. *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (2005).

Moreover, amendment would be futile because the changed circumstances described above have prudentially mooted Plaintiffs' claims such that they would not survive a motion to dismiss, *Willing v. Lake Orion Comm. Sch. Bd. of Trustees*, 924 F. Supp. 815, 818 (E.D. Mich. 1995), and could not establish a plausible claim. *Springs v. U.S. Dep't of Treasury*, 567 F. App'x 438, 446 (6th Cir. 2014).

Since Plaintiffs' schools are no longer under the control of an emergency manager, the EAA, and effective June 30, 2019, the SRO, any amendment would be futile because Plaintiffs' claims have been prudentially mooted. *Greenbaum v. U.S. Envtl. Prot. Agency*, 370 F.3d 527, 534-35 (6th Cir. 2004).

Under the rule of judicial restraint, prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). Because this appeal should be dismissed on mootness grounds, it is unnecessary for this Court to reach the constitutional issues raised in this appeal.

ARGUMENT OF MICHIGAN BOARD OF EDUCATION MEMBERS TOM MCMILLIN AND NIKKI SNYDER ONLY:

Although Defendants maintain that this appeal should be dismissed as moot, and that it is not necessary for this Court to decide, the constitutional issues, Defendants McMillin and Snyder, and State Board of Education members, make the following additional arguments in support of the district court's opinion.

II. Plaintiffs fail to establish a legal basis for their claim that State-provided access to literacy is a fundamental right under the Due Process Clause of the United States Constitution.

A. Analysis

Governmental conduct violates substantive due process only where it deprives an individual of a particular constitutional guarantee. *In re City of Detroit*, 841 F.3d 684, 699-700 (6th Cir. 2016) (no fundamental right to water service), citing *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). "'Substantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *City of Detroit*, 841 F.3d at 699 (quoting *EJS Props., L.L.C. v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012)). "Thus, 'the list of fundamental rights is short,' *Grinter v. Knight,* 532

F.3d 567, 563 (6th Cir. 2008), and seldom expanded, see *Washington* [*v. Glucksberg*, 521 U.S. 702, 720 (1997)]." *City of Detroit*, 841 F.3d at 700. "Most state-created rights that qualify for due process protections do not rise to the level of substantive due process protection." *Range*, 763 F.3d at 588 n. 6.

Notwithstanding this cautionary language from *Range* about state-created rights, Plaintiffs assert, as they did below, that Defendants have violated their fundamental, substantive due process right to "State-provided access to literacy." (Appellants' Brief, Doc. 49, pp. 36-37.) Simply put, no such right exists.

Moreover, the claimed right of access to literacy not only presupposes a positive right to a reading education, but, using Plaintiffs' result-based methods of gauging "access to literacy," Plaintiffs ask that the United States Constitution be used to guarantee the outcome of an educational method.

Historically, when courts have held that a state is required to provide a service, such as assistance of counsel, it is not required to guarantee the result, for instance an acquittal. *U.S. v. Hoffman*, 926 F. Supp. 659, 672–73 (W.D. Tenn. 1996), aff'd, 124 F.3d 200 (6th Cir. 1997)

(Constitution provides a right to the effective assistance of counsel, but does not guarantee that counsel will successfully secure an acquittal.). Under Plaintiffs' legal theory, however, the right to counsel is transformed into a right to an acquittal, distorting our Constitution and rewriting its text.[15]

Plaintiffs' claim to a "State-provided" right further ignores the fact that decisions about what teachers should teach, how many to hire, what buildings to improve or close, how best to maintain them, which textbooks and materials to buy, and classroom size–all the decisions Plaintiffs complain about in their complaint–are, and always have been, local matters. It follows that nothing in the Due Process Clause requires a state to provide the individualized result of literacy or the direct, localized, and specific education to achieve it.

Along those lines, the Michigan Court of Appeals concluded that Michigan's constitution requires only that the Legislature provide for a system of free public schools, leaving the details and delivery of specific

[15] As recognized by Plaintiffs, "[t]he foundation of American liberty is our written Constitution. *See Marbury v. Madison*, 5 U.S. 137, 176, 178 (1803)." (Appellants' Brief, Doc. 49, p. 28.) They fail to acknowledge, however, that our written Constitution makes no mention of "access to literacy."

educational services to the local school districts. *L.M.*, 862 N.W.2d at 252–54. As explained in *L.M.*, none of the Defendants here have ever operated, or been responsible for operating, local schools in Detroit. *Id.* And as explained above, the only reason the district court found Defendants to be proper parties was because of the State's intervention in the financial and academic problems that plagued Detroit schools. "No single tradition in public education is more deeply rooted than local control over the operation of schools[.]" *Widdoes v. Detroit Public Schools*, 553 N.W.2d 688, 690-691 (Mich. Ct. App. 1996) (citation omitted); see also *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974).

Plaintiffs quote *Board of Education v. Bacon*, 162 N.W. 416 (Mich. 1917), for the proposition that the Michigan Supreme Court "repeatedly held that education in this State is not a matter of local concern, but belongs to the State at large." But *Bacon* involved the method of altering the bounds of school districts. It did not involve who should teach in schools, what should be taught through what methods or tools, and it certainly did not involve any guarantee of an outcome resulting from the process of education. *Id.*

Moreover, *Bacon* cited *Attorney General v. Thompson*, 134 N.W. 722 (Mich. 1912), in which Michigan's Supreme Court held that schools are established by the state, but administered at the local level:

> [O]ur free school system has been organized, fostered, and supported by constitutional provisions and legislative enactment, as a primary and distinctive function of State government held under State control. *Its administration, however, has been committed in its details to local agencies* of limited territory, designated district boards or boards of education, co-operating with, and more or less closely allied to, municipal corporations for local government . . . [*Id.* at 725 (emphasis added).]

Therefore, contrary to Plaintiffs' arguments, Michigan law has always recognized that, while the system of education is statewide and independent from direct control by townships, cities, and other municipalities, local school-board discretion and accountability to a local electorate are the hallmarks of school administration. *Milliken*, 418 U.S. at 741-43.

To circumvent this clear history of local control over public education, Plaintiffs set forth two arguments, the first extrapolated from inapposite analysis of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and the second based on an equally inapposite analysis of *Youngberg v. Romeo,* 457 U.S. 307 (1982). Neither of these arguments justify

deviating from Supreme Court precedent to create a new fundamental right.

1. Plaintiffs fail to overcome the strong reluctance of courts to establish new, positive rights under the Due Process Clause.

Federal courts have never recognized a fundamental right of access to literacy and the Supreme Court has expressed reluctance in extending constitutional protections, noting that by recognizing a right as fundamental, it "place[s] the matter outside the arena of public debate and legislative action . . . ." *Glucksberg*, 521 U.S. at 720. Accordingly, the Court looks to see whether the asserted right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental[.]" *Id.*, citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In determining whether a right is fundamental, judicial self-restraint requires courts to focus on the plaintiff's description of the right and what the government allegedly did to deprive the plaintiff of that right. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Here, despite Plaintiffs' passionate plea alleging that access to literacy is a fundamental right, they do not allege what Defendants did to deprive Plaintiffs of literacy. Plaintiffs failed to plead any state

action that directly and arbitrarily interfered with Plaintiffs' access to an available education. (Corrected Op. and Order, R. 117, PageID#2815-2816, 2823-2824.) Thus, Plaintiffs did not allege the violation of a negative right based on a deprivation of a constitutionally protected interest. *City of Detroit*, 841 F.3d at 699-700.

As the district court correctly found, Corrected Op. and Order, R. 117, PageID#2815-2816, 2823-2824, Plaintiffs claim that Defendants must affirmatively provide certain resources to Plaintiffs to ensure they attain literacy—as measured by a percentage of those students with reading proficiency. (Appellants' Brief, Doc. 49, pp. 22-23.) For example, Plaintiffs claim that the State has "failed to ensure that Plaintiffs' schools have basic school supplies." (Complaint, R. 1, ¶11, PageID#11.) Therefore, the district court correctly reviewed this case as a claim of a "positive" right to particular state action. *City of Detroit*, 841 F.3d at 699-700. And the relief Plaintiffs seek in their complaint clearly demonstrates the positive fundamental right they are asking this Court to recognize the following: implementation of evidence-based programs for literacy instruction and intervention; universal literacy screening; timely and appropriate intervention with students; and

establishment of a system of statewide accountability where the state monitors conditions that deny access to literacy.

Finding that a state *must* take action by providing a service turns the language of the Due Process Clause of the Fourteenth Amendment, which speaks directly to state action that "deprive[s]" persons of their interests or "den[ies]" them equal protection, on its head. "[T]he Constitution is a charter of negative rather than positive liberties." *Rogers v. City of Port Huron*, 833 F. Supp. 1212, 1216 (E.D. Mich. 1993). Plaintiffs seek, via judicial fiat, to invert the language of fundamental rights jurisprudence.

The Constitution does not provide Plaintiffs an affirmative right to governmental aid, even if it may be necessary to secure a fundamental right. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989).

Plaintiffs mistakenly rely on *Obergefell* as a means of asserting a "positive" fundamental right. The Court reviewed the issue under the Equal Protection Clause and determined that states were required to issue licenses to same-sex couples under the same standards that would apply to opposite-sex couples. *Obergefell*, 135 S. Ct. at 2602-03. The

Court based its decision on the long-recognized fundamental right to marry, and found that state laws prohibiting same-sex couples from marrying interfered with that fundamental right.

The Court held that state laws barring same-sex couples from participating in marriage offended the Constitution. But here, there are no state statutes, constitutional provisions, or even state policies or actions, that bar access to participation in the education system.

Plaintiffs argue that the historical context of the States' role in education, paired with the importance of literacy to ordered liberty, requires each state to provide "access to literacy" to the persons found within its borders. (Appellants' Brief, Doc. 49, pp. 25-26.) Plaintiffs' arguments fail because they misconstrue the historical nature of state involvement in education as well as literacy's place in the constitutional concept of ordered liberty.

a. Plaintiffs overstate the significance of statewide systems of education in 1868.

Plaintiffs argue that the right of access to literacy has such strong historical roots that, under *Obergefell*, this Court should recognize it as a positive, fundamental right. In other words, Plaintiffs argue that, like a marriage license in *Obergefell*, the State violates substantive due

process when it withholds the means that would provide access to literacy.

Plaintiffs' arguments rest on the premise that at the time of the Fourteenth Amendment's adoption, three-quarters of the state constitutions required their state governments to establish a statewide *system* of education.[16] (Appellants' Brief, Doc. 49, pp. 26-27.) Plaintiffs fail to draw any significant connection between the state constitutions' establishment of centralized, unitary, statewide educational systems, complete with uniform, relatively equitable funding schemes on one side, and a nationally recognized individual right to state-provided access to literacy, on the other. Simply because the states decided to centralize the organization of their educational systems does not mean that they intended to guarantee a specific type of education delivered by state-government officials.

[16] Contrary to Plaintiffs' argument, the district court did not use the "wrong" date in its historical analysis. While the district court analyzed the novelty of government-provided education when the Fifth (as opposed to the Fourteenth) Amendment's Due Process Clause was adopted, it did so in the context of evaluating whether precedent "requires finding that neither liberty nor justice would exist absent state-provided literacy access." (Corrected Op. and Order, R. 117, Page ID#2818.)

On the contrary, Michigan's Constitution of 1850 states that the Legislature must "establish a system of primary schools," and that "a school shall be kept without charge for tuition, at least three months in each year," but it also recognizes that such a school "shall be kept . . . in every school district in the state." Mich. Const. 1850, art. 13, § 4. A separate section of the historic Michigan Constitution discusses the removal of "any officer elected by a county, township, or school district . . . ." Mich. Const. 1850, art. 12, § 7. And the provisions that create the superintendent of public instruction and the state school board ascribe to them only "general supervision" over the statewide education system. Mich. Const. 1850, art. 13, §§ 1, 9.

This is a far cry from recognizing that each individual within the state has a fundamental right to state-provided literacy services, funded and delivered by the state. The Michigan Constitutional provisions at issue do not even contain the individual rights language of Article Eighteen's "right to bear arms." Mich. Const. 1850, art. 18, § 7. According to that Article, "[e]very person has a right to bear arms for the defense of himself and the state." *Id.*; see also *McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010) (controlling opinion) (evaluating

State Constitutions in 1868 and finding, "[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.")[17]

In context, no special understanding or intent can be gathered from the 1868 State Constitutions except that states preferred a uniform, statewide education system with general state supervision to a structureless system where local education funds derived solely, and inconsistently, from local sources and no statewide standards existed. A state's decision to resolve some pressing issues of educational injustice does not oblige it to resolve all of them all at once. See *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). Instead, "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* (quoting *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955)).

[17] Plaintiffs' reliance on *McDonald* is misplaced because, unlike their asserted right of access to literacy, the right to bear arms is expressly contained in the written text of the Second Amendment to the Constitution, leaving no ambiguity as to its existence.

Adopting Plaintiffs' method of finding fundamental rights by combing a state's history of general reforms would force the opposite approach. It would create a fundamental right everywhere a State Constitution, or other law, had previously taken expansive action on an important issue—requiring it to then "'strike at all evils at the same time,'" which is not the law. *Katzenbach,* 384 U.S. at 657 (quoting *Semler v. Dental Examiners*, 294 U.S. 608, 610 (1935)). A state's high-level educational reforms (statewide systems) are insufficient to ascribe a "fundamental" historical value to a particular type of education (literacy training). Accordingly, Plaintiffs' historical arguments fail.

Adopting Plaintiffs' arguments about the historically "fundamental" nature of education in 1868 would also run contrary to the U.S. Supreme Court's findings in *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-90 (1954), in which the Court recognized that in 1868 the southern states had yet even to join "the movement toward free common schools, supported by general taxation . . . ." The educational systems in the northern states at this time were more developed, but they still "did not approximate those existing today." *Id.* at 490. "The curriculum was usually rudimentary; ungraded schools were common in rural

areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown." *Id*. at 490. The Court went on to find, "[a]s a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education." *Id*.

Ultimately, the *Brown* Court found the historical evidence of an intent to include education among the rights afforded by the Due Process Clause "inconclusive." *Id*. at 489. Plaintiffs' discovery of a recognized, established, and highly valued right to "access to literacy" in its review of this same stretch of U.S. history contravenes the Supreme Court's findings on this issue.

b. Access to literacy is not so fundamental to ordered liberty and justice as to justify its inclusion among the positive rights afforded by the U.S. Constitution.

Contrary to Plaintiffs' claims regarding literacy's relationship to "concepts of ordered liberty," Courts have long rejected claims to a fundamental right of education. As the district court recognized, "access to literacy" is essentially "a minimally adequate education." (Corrected Op. and Order, R. 117, PageID#2815.)

The Supreme Court addressed "whether education is a fundamental right . . . protected by the Constitution" and unambiguously held that no such right exists.[18] *Rodriguez*, 411 U.S. at 29, 35. Although the Court acknowledged the importance of education, it cautioned that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental." *Id.* at 30. Otherwise, courts become "'super-legislature[s],'" taking a legislative role for which they lack "both authority and competence." *Id.* at 30–31 (internal citation omitted).

Moreover, "'the Constitution does not provide judicial remedies for every social and economic ill.'" *Id.* at 32, quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). For example, although housing may be important, the Constitution does not create a fundamental right to housing. *Rodriguez*, 411 U.S. at 32. Indeed, courts must refrain from

[18] Although Plaintiffs try to differentiate between education and "access to literacy," their claimed right of "access to literacy" is a mere proxy for a right to a particular outcome of education, and education has been rejected as a fundamental right under the Due Process Clause. See *Rodriguez*, 411 U.S. at 29, 35. Although the district court rejected this argument, Corrected Op. and Order, R. 117, Page ID #2796-97, it nonetheless admitted that "access to literacy" is essentially "a minimally adequate education." (Corrected Op. and Order, R. 117, Page ID #at 2815.)

creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws." *Id.* at 33. Rather, courts must look at the Constitution itself to determine whether "a right to education is explicitly or implicitly" guaranteed. *Id.* The Supreme Court has determined that there was no express or even implied fundamental right to education. *Id.* at 35.

Nine years later, the Court again addressed this issue and reached the same conclusion: "Public education is not a 'right' granted to individuals by the Constitution." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). And in 1988 the Court once again reaffirmed *Rodriguez* by noting that education is not a fundamental right subject to strict scrutiny. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988).

Accordingly, the district court rejected Plaintiffs' arguments. The district court correctly recognized that, at the time of the adoption of the U.S. Constitution, public education that went beyond rudimentary local cooperation was nonexistent. (Corrected Op. and Order, R. 117, PageID#2818.) The district court drew on this historic fact to demonstrate that the national conscience does not draw an absolute corollary between "State-provided" education and an ordered society.

While education is important, history belies the argument that State-provided access to literacy is so essential to liberty or justice that the Constitution's Framers were lost without it.

The district court's conclusions are consistent with the historical development of education and its present form. The current design of locally-run schools, together with the options of charter schools, private schools, and home schools, all operating, to varying degrees, within a State system of education, belies the argument that *State-provided* access to literacy is now, or ever has been, viewed as fundamental to ensuring liberty or justice. Michigan's Constitution does not even mandate the State's exclusive control over the system of education. *Council of Orgs & Others for Education v. Governor*, 566 N.W.2d 208, 216 (Mich. 1997).

2. The district court correctly rejected Plaintiffs' claims that the compulsory nature of education renders access to literacy a fundamental right.

Plaintiffs next argue that the compulsory nature of public education creates a separate set of duties and justifies transforming the issue from one in which the State must provide a positive right to one characterized by the State denying Plaintiffs a right of access.

Plaintiffs argue that the district court should have evaluated their claims as presenting both a "positive" and "negative" violation of the Due Process Clause. Plaintiffs' arguments not only lack legal support, they also mischaracterize the discussion of the issue below.

The district court correctly determined that Plaintiffs' request for relief was positive, namely that, according to Plaintiffs, Defendants were constitutionally required to provide the tools and resources necessary to institute an "Evidence-Based" approach to literacy instruction. (Complaint, R. 1, ¶¶164-190, PageID#112-122.) Plaintiffs' claims did not assail the constitutionality of the State's overall education system or any specific part of it. (Corrected Op. and Order, R. 117, PageID#2811.)

Under these circumstances, the district court correctly viewed the issue as a "positive" rights case—one in which Plaintiffs argue for "positive" action by the State. Plaintiffs' argument that the State denied them "access to literacy" (an alleged "negative" right) distorts the Due Process Clause's *restriction* on State action through the expedient of lexical wizardry. Adopting Plaintiffs' approach would turn every "positive" rights case into a "negative" case by interposing the

phrase "access to" in front of the positive duty alleged. The constitutional right to interstate travel becomes the State's obligation to provide "access to interstate travel" (via a bus ticket) or risk a federal court finding that the State has "interfered" with the constitutional right (by refusing to purchase the ticket on the plaintiff's behalf). The constitutional right to bear arms becomes the right to "access arms," so the state must open its police armories to all comers.

Plaintiffs' reliance on the compulsory nature of education does not change the analysis. As an initial matter, compulsory education is a post-1868 innovation, so Plaintiffs are hard-pressed to demonstrate how the Fourteenth Amendment could embody the concept of "access to literacy" in the modern context. *Brown*, 347 U.S. at 490.

More fundamentally, however, Plaintiffs never developed this argument before the district court. Nor did Plaintiffs' brief *Youngberg*, merely filing it as a supplemental authority without any analysis. Although they admonish the district court for allegedly "refus[ing] to consider the issue," Appellants' Brief at p. 53, Plaintiffs did not "assert[]" this claim. Rather, as recognized by the district court, they "note[d]" it in the complaint or "mention[ed] it, in a footnote."

(Corrected Op. and Order, R. 117, PageID#2821.) Plaintiffs' claim that they presented both "positive" and "negative" violations of their substantive due process rights does not comport with the relief they sought, so the district court correctly rejected this argument. Under these circumstances, Plaintiffs failed to preserve this argument and it should not be considered by this Court. *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (2005).

3. Plaintiffs' reliance on *Youngberg* is misplaced.

Nor is Plaintiffs' compulsory-education theory supported by law. Plaintiffs essentially rely on a single case, *Youngberg*, 457 U.S. 307, to support their proposition that the compulsory nature of education affords them a concomitant state duty to provide effective literacy instruction. But *Youngberg* does not support this proposition.

Youngberg involved the involuntary committal of a 33-year old individual (Nicholas) with the mental capacity of an 18-month-old child into a state mental facility.

Nicholas's mother sued the facility after Nicholas injured himself on numerous occasions. At issue were "the substantive rights of *involuntarily committed mentally retarded persons under the Fourteenth*

Amendment," *Id.* at 314 (emphasis added), an issue wholly unrelated to the present case. Contrary to Plaintiffs' analysis, the Court carefully limited its analysis to individuals the State has placed in its absolute control, such as in a mental institution. *Id.* at 321-22.

The Court first identified the fundamental liberty interest under the Fourteenth Amendment—the right to personal security and freedom from bodily restraint. Under the court's analysis, it is only "[w]hen a person is institutionalized—and wholly dependent on the State" that the State has a duty "to provide minimally adequate or reasonable training." *Id.* at 317-18. Even then, the purpose of the training is solely "to ensure safety and freedom from undue restraint." *Id.* at 318, 322-24.

Youngberg has no application to this case because it only applies to circumstances in which the state has taken total control of an individual by placing that individual in State custody—such as a mental institution—leaving the individual without any autonomy or self-direction.

Plaintiffs base their analysis of *Youngberg* on a faulty premise, conflating compulsory school attendance laws, which require a limited

number of hours of schooling per day for 180 days per year, M.C.L. §§ 380.1561 and 388.1701(3)(b), with commitment to a mental institution or a prison, both of which involve total state control over a person 24-hours per day, every day.

Michigan's system of compulsory education is not synonymous with complete State custody. To begin with, the State does not require school-aged children to attend school at a designated location. Instead, parents and students have several options, including homeschooling, private schools, charter schools, cyber schools and schools of choice. M.C.L. §§ 380.501, 380.1561(3). See also *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1371 (3rd Cir. 1992). Prisoners and those committed to state mental institutions do not have such—or any—choices.

Moreover, the degree of control exerted by school administrators over schoolchildren in the typical school day is far less than the degree exerted by institutions of confinement. See, e.g., *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1080-81 (5th Cir. 1995). Plaintiffs' arguments run contrary to the consistent findings of other circuit courts that a child attending a public school is not sufficiently under the

school's control to deem the child in "custody." See *Morrow v. Balaski*, 719 F.3d 160, 175 (3rd Cir. 2013); *Patel v. Kent Sch. Dist.,* 648 F.3d 965, 973 (9th Cir. 2011); *Dorothy J. v. Little Rock Sch. Dist*., 7 F.3d 729, 732 (8th Cir. 1993); *D.R.*, 972 F.2d at 1371 (distinguishing school attendance from *Youngberg* custody).

And compulsory education laws serve different purposes than laws governing involuntary detention. In *Slocum v. Holton Bd. Of Ed.*, 429 N.W.2d 607, 609-610 (Mich. App. 1988), the Michigan Court of Appeals, citing an Attorney General opinion, noted the educational value in regular attendance at school, including instilling self-discipline, exposing students to group interactions, and allowing students to hear and participate in class instruction, discussion and other related learning that may not be fully reflected in test results.

Clearly, a student attending school under the compulsory attendance law bears no similarity to an individual who is detained in state custody. Because neither schools nor the State exert the type of absolute control over children that would invoke the affirmative duties at issue in *Youngberg*, Plaintiffs' reliance on it is misplaced.

4. The case law fails to support Plaintiffs' claim that compulsory education creates a duty to provide access to literacy.

Plaintiffs further argue that compulsory education creates a corresponding duty to provide access to literacy because confinement must bear a relationship to the State's interests. Setting aside the fact that compelling school attendance is not confinement, Plaintiffs' argument fails because, contrary to their arguments, the proposition that compulsory education creates a special duty finds no support in the case law.

The cases Plaintiffs cite in support of their interpretation of *Youngberg* are inapplicable. Because the present case does not involve civil or criminal commitment, *Jackson v. Indiana*, 406 U.S. 715 (1972) does not apply. The concurring opinions of *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 609-10 (2014), *Reno v. Flores*, 507 U.S. 292 (1993) and *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983) lack precedential value. Nor does the dicta cited from *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) and *Prince v. Massachusetts*, 321 U.S. 158 (1944) help Plaintiffs. And the issues regarding access to the court system discussed in *Boddie v.*

Connecticut, 401 U.S. 371 (1971) and *Griffin v. Illinois*, 351 U.S. 12 (1956) have no bearing on the present case.

Plaintiffs' reliance on *DeShaney* is similarly misplaced. *DeShaney* supports the district court's decision. Under *DeShaney*, the Due Process Clause does not require a state to protect the life, liberty, and property of its citizens against invasion by private actors because it is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. 489 U.S. at 195.

Requiring a student to attend a public, private, charter, or home school a few hours a day for 180 days per year does not rise to the level of an affirmative restraint on individual liberty comparable to incarceration or institutionalization.

III. The District Court Correctly Rejected Plaintiffs' Claim that the State Violated their Rights to Equal Protection.

A. Plaintiffs failed to plead an Equal Protection claim.

As held by the district court, three grounds exist for Plaintiffs to establish an Equal Protection claim: burdening a fundamental right; targeting a suspect class; or lacking a rational basis. (Corrected Op. and Order, R. 117, PageID#2821.) Because "access to literacy" is not a

fundamental right, it cannot anchor an Equal Protection claim. That leaves Plaintiffs with two paths, neither of which lead to viable claims.

1. Defendants have not targeted a suspect class.

Contrary to Plaintiffs' claims, Defendants have not excluded them or anyone else from Michigan's schools. The fact that they are unable to identify any law that excludes them from Michigan's system of public schools serves as a tacit admission that their claims lack any legal basis. They try to side-step the issue by claiming a "functional" exclusion, relying on *Plyler*. But only an absolute—that is, complete—denial of an education violates Equal Protection. *Rodriguez*, 411 U.S. at 23-25. And *Plyler* clearly defined an absolute deprivation—a statutory prohibition of an education for an identifiable class of children. *Plyler*, 457 U.S. at 221. Plaintiffs, however, make no such allegation here.

This failure is fatal to their claim because a viable Equal Protection claim requires discriminatory governmental action. *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61-62 (6th Cir. 1966) (*Deal I*); *Spurlock v. Fox*, 176 F.3d 383, 394 (6th Cir. 2013). A "policy . . . conceived without bias and administered uniformly to all who fall

within its jurisdiction" satisfies Equal Protection. *Deal I*, 369 F.2d at 61.

A racial imbalance at schools, as alleged by Plaintiffs, does not establish a deprivation of equal protection, *Deal I*, 369 F.3d at 62, because governments do not control the factors, including residential housing patterns, causing the imbalance. *Spurlock*, 716 F.3d at 396; *Deal v. Cincinnati Bd. of Educ.*, 419 F.2d 1387, 1392 (6th Cir. 1966)(*Deal II*). Rather, a showing of "discriminatory state action" is mandatory. *Deal I*, 369 F.2d at 63. The Constitution forbids governments from excluding pupils based on race, but "it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to some disproportionate racial concentrations." *Higgins v. Bd. of Educ. of City of Grand Rapids*, 508 F.2d 779, 789 (6th Cir. 1974). Plaintiffs' mere allegation of disparate impact, absent discrimination, is insufficient. *Spurlock*, 716 F.3d at 397-98.

2. The appropriate comparator is students in districts that have experienced State intervention.

Plaintiffs contend that the statewide nature of compulsory education means that their comparable group is all the other children in

Michigan's public education system. (Appellants' Brief, Doc. 49, p.61-62.) But the district court correctly limited the comparison to those schools that required state intervention. (Corrected Op. and Order, R. 117, PageID#2821.) This comparison was necessary because Plaintiffs never challenged Michigan's "school funding scheme, a specific statute or any particular decision by Defendants." (*Id.*) Instead, they challenged the alleged result of the State's specific intervention in Detroit's schools. (*Id.*) Accordingly, "the appropriate comparator . . . are therefore other Michigan schools that have come under the control of emergency managers, been designated a Priority School or were governed by the EAA." (*Id.*)

The Equal Protection Clause bans racially-motivated differential treatment, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), requiring equal treatment of similarly situated people. *Plyler*, 457 U.S. at 216. But its protection reaches only to dissimilar treatment among those similarly situated. *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). If the government action does not appear to classify or distinguish between two or more relevant

persons or groups, the action does not deny equal protection of the laws. *Id.*

Plaintiffs' claims fail at the outset because they never alleged that they were treated differently than similarly situated students. Instead, Plaintiffs allege that, on the basis of race, they received differential treatment than "other students in the State of Michigan receiving education in Michigan Public Schools." (Complaint, R. 1, ¶¶200, 207, PageID#126–128.) But that is not the appropriate comparison group. Plaintiffs cannot rely on alleged disparate treatment with students in Michigan schools not subject to state intervention. Instead, they must rely on alleged disparate treatment in districts that, like Detroit, experienced state intervention. *Phillips*, 836 F.3d at 718-720 ("Individuals in jurisdictions without emergency managers are not relevant to the protected right.").

Moreover, to state an Equal Protection claim, "a plaintiff must adequately plead that the government treated the plaintiff disparately" because of race. *Ctr. for Bio-Ethical Reform*, 648 F.3d at 379 (internal citation omitted). The complaint includes numerous allegations of inadequate school buildings and facilities, insufficient instructional

materials, such as course offerings, textbooks and other basic school supplies, as well as unsafe or unsanitary physical conditions and extreme temperatures within these specific schools. (Complaint, R. 1, ¶¶ 112-137, PageID#81-98.)

Yet these same conditions equally affect *all* students within the same schools regardless of race. Plaintiffs' Equal Protection claim fails because there simply is no similarly situated group of white or non-minority students at the named Detroit schools who have experienced different conditions than Plaintiffs. To the contrary, all the schools have some percentage of white or non-Hispanic students in their populations, (Complaint, R. 1 ¶90, PageID#62-63.) Plaintiffs make no allegation that non-children-of-color receive better facilities or instruction at the named schools, much less that Defendants knew of the disparity and failed to take measures to remedy it. Therefore, Plaintiffs' Equal Protection claim fails as a matter of law.

3. The district court correctly applied rational basis review.

The district court properly determined that rational basis review applied to Plaintiffs' claims. (Corrected Op. and Order, R. 117,

PageID#2820-21.) Michigan's laws pertaining to school district financial emergencies and addressing the academic deficiencies of the lowest 5% of public schools in this state satisfies that standard. Moreover, it should be noted that Plaintiffs' failure to identify any specific Defendants' decisions as irrational dooms their Equal Protection claim. (*Id.* at 2823.)

a. Heightened scrutiny does not apply.

Contrary to Plaintiffs' claims, heightened scrutiny does not apply. (Appellants' Brief, Doc. 49, p. 62.) But Michigan nonetheless satisfies heightened scrutiny because its system of educational financing and financial and academic oversight furthers the substantial state interest of educating children and protecting the financial solvency of school districts. See for example M.C.L. § 141.1543 (legislative findings about insolvency of local governments, including school districts). This case differs from *Plyler*, in which the Court applied intermediate scrutiny, requiring the Texas policy to reflect a "reasoned judgment" in furtherance of a substantial state interest. *Plyler*, 457 U.S. at 217-218. The *Plyler* Court confronted a Texas statute that prevented undocumented immigrant children from attending public schools. *Id.* at

205-206. The Court found no rational basis in Texas' exclusion of an entire group of children from attending school "on the basis of a legal characteristic over which [they] have little control," particularly where "States enjoy no power with respect to the classification of aliens." *Id.* at 220, 224-225. Nor did Texas demonstrate that its policy of denying "a discrete group of innocent children the free public education" offered to all other Texas children furthered a substantial state interest.[19] *Id.* at 230.

In the present case, however, there are no allegations that a discrete group of children is denied a free public education. Nor is there an absolute deprivation via a statutory prohibition of an education for an identifiable class of children, as identified in *Plyler*, 457 U.S. at 221. Rather, Plaintiffs allege that the education provided is insufficient to achieve adequate literacy.

Intermediate scrutiny "has generally been applied only in cases that involved discriminatory classifications based on sex or

[19] That Plaintiffs have several educational choices further removes this from the ambit of *Plyler*. Contrary to the district court, Corrected Op. and Order, R. 117, PageID#2812, n. 10, most of these options do not impose a cost on students or parents—homeschooling, charter schools, cyber schools and schools of choice. M.C.L. §§ 380.501, 380.1561(3).

illegitimacy." *Kadrmas,* 487 U.S. 459. As the *Kadrmas* Court recognized, *Plyler* had "unique circumstances"—children were denied access to the Texas education system based on their parents' illegal actions. *Kadrmas*, 487 U.S. at 459. Justice Powell likened this to classifications involving illegitimacy, which receive intermediate scrutiny, and concluded that the Texas law in *Plyler* should also receive intermediate scrutiny. *Plyler*, 457 U.S. at 238-239 (Powell, J., conc.). Justice Powell's concurrence is echoed in the *Plyler* majority opinion when the Court noted, "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 220.

Reading *Kadrmas* together with *Plyler*, it is clear that *Plyler* applied intermediate scrutiny not because the case involved educational rights, but rather because the Texas law penalized children for their parents' actions. In the present case, Plaintiffs do not allege that Defendants have acted pursuant to a statute that denies an identifiable group of children a free public education based on their parents' misconduct. Plaintiffs' claims fail to meet the standards for the application of heightened scrutiny.

b. Michigan's system satisfies rational basis review.

Because neither a fundamental right nor a suspect classification is at issue, rational basis review applies. *Rodriguez*, 411 U.S. at 40-44; *City of Detroit*, 841 F.3d at 700. The government classification challenged "is presumed valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 437 U.S. at 440. Such classifications are rarely—and only in exceptional cases—reversed. *Spurlock*, 716 F.3d at 402-03.

Plaintiffs must show that Defendants' actions "are not rationally related to a legitimate state purpose." *Martin Luther King, Jr., Elementary School Children*, 451 F. Supp at 1328; *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015). Plaintiffs must negate every conceivable basis which might support it. *Heller v. Doe*, 509 U.S. 312, 320 (1993). "A State, moreover, has no obligation to produce evidence to sustain rationality of a statutory classification." *Id.* This standard applies at the pleading stage and "plaintiff[s] must allege facts sufficient to overcome the presumption of rationality," *City of Detroit*, 841 F.3d at 702, which requires them to negate every conceivable basis for the challenged action. *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470

F.3d 250, 261 (6th Cir. 2006).[20] Plaintiffs, however, merely point to the conditions in their five schools "as prima facie evidence that the State—and Defendants specifically—have acted irrationally." (Corrected Op. and Order, R. 117, PageID#2823.)

In any case, Michigan's system satisfies Equal Protection. Like the system upheld in *Rodriguez*, the state provides funding to overcome economic disparities between districts. See *Rodriguez*, 411 U.S. at 7-14. Plaintiffs do not challenge the Local Financial Stability and Choice Act, 2012 Mich. Pub. Acts 436, under which an emergency manager was appointed to exercise the powers and duties of the District's board of education. Nor do Plaintiffs challenge the SRO's functions overseeing the lowest achieving 5% of public schools in the State.

The mere fact that a state's efforts to provide and improve educational opportunities fail to meet Plaintiffs' demands does not render it unconstitutional. *Martin Luther King, Jr., Elementary School Children*, 451 F. Supp. at 1328. Nor is a system unconstitutional

[20] This test may also be satisfied where animus or ill-will is alleged, *Scarbrough*, 470 F.3d at 261, which Plaintiffs fail to do.

because disparities exist or because it is otherwise imperfect. *Rodriguez*, 411 U.S. at 54-55.

CONCLUSION AND RELIEF REQUESTED

All Defendants request that this Court dismiss Plaintiffs' appeal on mootness grounds. In the past few years, the State has removed the emergency manager dissolved the EAA, and effective June 30, 2019, the SRO and Priority Schools will be abolished. The DPSCD Board and its superintendent have been in place for two years and the District is subject to full local control over the operation of its schools. Under these circumstances, Plaintiffs' claims are moot. Because any remaining claims relate solely to Defendants' past conduct, which are barred by the Eleventh Amendment, this Court should affirm the dismissal of Plaintiffs claims on mootness grounds.

The Governor and all other Defendants, except Michigan State Board of Education Members Tom McMillin and Nikki Snyder, take no position on the substance of the district court's decision, as this Court need not reach this broader constitutional issue. If this Court does reach that issue, Mr. McMillin and Ms. Snyder further argue that the district court correctly dismissed Plaintiffs' claims, including their

attempt to create a new fundamental right of access to literacy. They contend that the district court also correctly held that Plaintiffs failed to allege sufficient facts in support of their Equal Protection claim.

Accordingly, this Court should affirm.

Respectfully submitted,

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Dated: May 24, 2019

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 12,669 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I electronically filed the foregoing **Defendants-Appellees' Response Brief** with the Clerk of the Court using the ECF filing system, which will provide electronic copies to counsel of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Record #	Description	Date	Page ID#
R. 1	Complaint	09/13/16	1-136
R. 60	Defendants' Motion to Dismiss	11/17/16	479-1358
R. 64	Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss	01/12/17	1398-1456
R. 96	Defendants' Reply in Support of Motion to Dismiss	02/2/17	1487-1924
R. 108	Notice of Supplemental Authority in Support of Plaintiffs' Response to Defendants' Motion to Dismiss (Doc. 64)	08/4/17	2531-2548
R. 109	Transcript of August 10, 2017 Hearing on Motion to Dismiss	08/18/17	2549-2598
R. 112	Opinion and Order Granting Defendants' Motion to Dismiss	06/29/18	2738-2777
R. 113	Judgment	06/29/18	2778
R. 114	Notice of Appeal	07/26/18	2779-2781
R. 116	Notice of Correction	07/27/18	2784
R. 117	Opinion and Order Granting Defendants' Motion to Dismiss	07/27/18	2785-2824
R. 118	Amended Notice of Appeal	07/30/18	2825-2828